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PRESERVING THE INTEGRITY OF SRI LANKA'S CONSTITUTIONAL AND ELECTORAL PROCESS; OUTSTANDING ISSUES AND COMPARATIVE DISCUSSIONS

LAW & SOCIETY TRUST

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Editor's Note ... ...

At a time where Sri Lanka sees an alarmingly quickened deterioration of systems of accountable governance, the Review highlights the extent of these failures in regard to questions of constitutional and electoral importance.

This discussion is framed by the continuing bypassing of the 17th Amendment to the Constitution by the country's political rulers. Even during the time that this constitutional amendment was being implemented to some extent, many obstacles were put in the way of its proper implementation. The Elections Commission was never appointed while the National Police Commission was 'cribbed, cabined and confined' at every turn of its functioning.

The final denunciation of the 17th Amendment became apparent by the failure of the smaller parties in Parliament to nominate a member to the single remaining vacancy on the Constitutional Council, which led to the lapsing of the Council. Consequently direct Presidential appointments were made to the independent commissions set up in terms of the 17th Amendment, including the National Human Rights Commission. Appointments of judges to the Court of Appeal and Supreme Court also followed in like manner. The constitutional condition mandated by the 17th Amendment that the approval of the Council had to be first obtained before the appointments could have been made was wholly disregarded. This is the lamentable situation that continues to prevail.

Meanwhile, the constitution of a Parliamentary Select Committee (proposed by the Government as an apparent compromise to end this deadlock) may have been looked upon with less of a jaundiced public eye if there had been some sincerity evidenced in the speedy setting up of the Constitutional Council. In default thereof, the Select Committee proceedings stand in danger of being perceived as a mere delaying tactic to remedying an unconstitutional *status quo*.

The first paper that we publish contains representations made by the Law and Society Trust to another Select Committee of Parliament sitting to consider changes to parliamentary, provincial council and local government laws.

The Representations address relevant aspects of the statutory and constitutional framework governing elections. Upon their submission, LST was invited to make oral representations to the Select Committee in that regard.

Undoubtedly the participation of the public and civil society institutions in such reform initiatives spearheaded by the legislature is important. However, when the lack of the requisite political will to practically conform to constitutional guarantees

of accountable governance, is so spectacularly evidenced, mere amendments to statutes do not serve any purpose. There needs to be a concerted effort on the part of Sri Lankans to bring about this required political will to change the existing legal and constitutional order both in terms of theory and its actual implementation.

As part of this debate, the Review also publishes two recent judgements of the Court of Appeal in relation to the question of presidential immunity. In both instances, Presidential actions effectively setting the Constitution at naught, firstly in the refusal to constitute the Elections Commission and secondly in the direct appointments to the constitutional commissions, were challenged.

The Court of Appeal disallowed these applications citing the express constitutional prohibition against challenging acts of the President except in particular limited contexts. The Court's re-iteration of the old caution that "a judge cannot, under the thin guise of interpretation, usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interests of justice" is to be expected. Yet, when these discussions are taken from the legal arena to the public forum, an unsettling end result has been the successful claiming of immunity by the President under the Constitution for the very actions that could convincingly be argued to amount to a violation of that Constitution itself. There is no doubt that the continuance of the principle of "blanket" presidential immunity is a critical aspect of the existing constitutional framework that needs to be changed.

For the purpose of comparative discussions, we also publish a short paper by ***Dr. Badiul Alam Majumdar*** written on invitation by the Review. The paper examines the role of the Elections Commission pertaining to current controversies in regard to the determining of the electoral roll in Bangladesh.

The final paper looks at the continuing crisis regarding Nigeria's Human Rights Commission. These discussions are useful for Sri Lanka in the context of similarly grave problems affecting the functioning of our institutions of democratic governance.

Kishali Pinto-Jayawardena

REPRESENTATIONS OF THE LAW & SOCIETY TRUST TO THE SELECT COMMITTEE OF PARLIAMENT ON REFORMS TO PARLIAMENTARY, PROVINCIAL COUNCILS AND LOCAL AUTHORITY ELECTIONS[♠]

1. Introduction

It is well accepted, (through judicial interpretation), that the most effective way in which a voter may give expression to his/her views is by silently marking his/her ballot paper in the secrecy of the polling booth.[1]

Reform of election laws that violate the right to vote has been a long-standing concern in Sri Lanka. With this objective in mind, the Law and Society Trust (LST) engaged in comprehensive Representations which examined the current system of Parliamentary, Provincial Councils and Local Authority Elections for submission to the Select Committee of Parliament on Electoral Reforms.

The Representations, which are contained below, address certain aspects of the constitutional framework governing elections, most importantly the 17th Amendment to the Constitution.

Generally, international human rights standards (the right to take part in government; the right to vote and to be elected and the right to equal access to public service) are used to urge wholesale reform of the laws under review.

2. Preventing Electoral Misconduct; Strengthening the Law

Section 48A of the Parliamentary Elections Act No 1 of 1981 (as amended), (hereafter the Parliamentary Elections Act) and Section 46A of the Provincial Councils Elections Act No 2 of 1988, (hereafter the Provincial Council Elections Act), relate to disturbances at polling stations.

Brought in by the Elections Special Provisions Act, No 35 of 1988), they outline three specific instances in regard to which the Commissioner of Elections is empowered, subsequent to receipt of an information by the returning officer and after making such inquiries as he may deem necessary, to declare the poll void.

♠ These Representations reflect salient points in Recommendations formulated by attorney-at-law Kishali Pinto-Jayawardena and Dr Jayantha de Almeida Guneratne, President's Counsel as senior legal consultants for the National Human Rights Commission in 2004. They were revised for the Law and Society Trust (LST) in 2006 and were forwarded to the Select Committee of Parliament on Reforms to Parliamentary, Provincial Councils and Local Authority Elections on 20th June 2006 consequent to which LST was invited by the Select Committee to make oral submissions based on the written Representations. The input provided by former Supreme Court judge Justice MDH Fernando (at the stage of the National Human Rights Commission law reform process) and by Director, LST and senior attorney-at-law Mr RKW Goonesekere, (at the stage of finalisation for submission to the Select Committee of Parliament), is much appreciated. LST bears responsibility for the final views expressed in the Representations.

[1] *Karunatilleka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* [1999] Sri.L.R. 157] (per Justice MDH Fernando).

These are namely;

Where due to the occurrence of events of such a nature-

a) it is not possible to commence the poll at a polling station at the hour fixed for the commencement of the poll;

b) the poll at such polling station commences at the hour fixed for the opening of the poll but cannot be continued until the hour fixed for the closing of the poll;

c) any of the ballot boxes assigned to the polling station cannot be delivered to the counting officer.

The unhappy experiences of several parliamentary/presidential and provincial council elections have shown us that these provisions are highly inadequate to deal with poll malpractices affecting the right of franchise. The problems faced by the Commissioner of Elections in the specific context of provincial council elections were clearly explained in a letter written by him to the President dated 27.02.1999 wherein the Commissioner suggested five additional sections to the relevant section.

These were as follows; if it is not possible to conduct the poll due to any reason beyond the control of the Presiding Officer, if one or more polling agents are chased out during the poll, non-arrival of the polling party at the polling station due to obstruction on the way; if any disturbance of peace at the polling station makes it impossible to take the poll and if any stuffing of ballot papers is forcibly done by unauthorised persons

This letter[2] had, in fact, been written by the Commissioner to the President following a particularly problematic election held in the North Western Province (the Wayamba elections) in January 1999. The Wayamba elections saw overt and massive rigging and stuffing of ballot papers by parliamentarians and provincial council politicians of the then ruling party, with the election officials and police officials either helpless or acquiescing in the process.

Shortly thereafter, the Supreme Court gave judicial effect to these concerns. In *Jayantha Adikari Egodawela and Others vs The Commissioner of Elections and Others,*[3] relief was afforded to four registered voters of the Kandy District, who had petitioned court regarding various incidents alleged to have occurred on election day at twenty five polling stations in the District in elections held in the Central Province in April, 1999.

These incidents included the premature closure of one polling station, ballot stuffing, driving away polling agents and intimidation of several others. The petitioners alleged infringement of their rights under Articles 12(1) and 14(1)(a) of Sri Lanka's Constitution, relating respectively to the right to equality before the law and the right to freedom of expression. The Court ruled that the specific election malpractice in question warranted the annulment of the poll under Section 46A of the

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[2] *See Edrisinha vs Dissanayake,* SC No 265/99, SCM, 23.3.99 (per Justice MDH Fernando) where this document was produced before court in a case filed by voters in the public interest.

[3] *The Egodeawela Cae, reported as Mediwake v Dissanayake & Others [*2001], (1) Sri LR 177. The Court (per Justice MDH Fernando) ordered Rs 50,000 as costs in the absence of compensation prayed for by the petitioners, payable by the State, on the reasoning that the Commissioner of Elections had made an honest – though inadequate effort to ensure a genuine election but was not given the necessary support and resources.

Provincial Councils Elections Act and stated that the Commissioner of Elections was under a consequent duty to order a repoll.

The judgement articulated a general principle that is applicable to the Commissioner of Elections and his Returning Officers in relation to the conducting of all elections. We are firmly of the view that Section 48A of the Parliamentary Elections Act and Section 46A of the Provincial Councils Elections Act (vide the Elections Special Provisions Act, No 35 of 1988) should be specifically amended to empower the Commissioner to declare a poll void in the following instances;

Where due to the occurrence of events of such a nature;

a) it is not possible to commence the poll at a polling station at the hour fixed for the commencement of the poll;

b) the poll at such polling station commences at the hour fixed for the opening of the poll but cannot be continued until the hour fixed for the closing of the poll;

c) any of the ballot boxes assigned to the polling station cannot be delivered to the counting officer.

d) It is not possible to conduct the poll due to any reason beyond the control of the Presiding Officer or as a consequence of the said presiding Officer failing to perform his/her functions;

e) If one or more polling agents are chased out during the poll;

f) Non-arrival of the polling party at the polling station due to obstruction on the way;

g) If any disturbance of peace at the polling station makes it impossible to take the poll;

h) If any stuffing of ballot papers is forcibly done by unauthorised persons;

i) If the poll cannot be conducted in a manner **free** of any improper influence or pressure; **equal,** where all those entitled to vote (and no others) are allowed to express their choice as between parties and candidates who compete on equal terms; and where the **secrecy** of the ballot is respected.

We recommend that these amendments, as a whole, be incorporated in the Local Authorities Elections Ordinance No 53 of 1946 (hereafter Local Authorities Elections Ordinance) as well.

It is pertinent to quote from the *Egodawela Case* that election malpractice of this nature is not simply a matter of "*x* ballots being stuffed or *y* polling agents being driven out." Instead;

> *Ballot stuffing and driving out polling agents go hand in hand with violence or the threat of violence – which in turn, will have a deterrent effect on electors in the vicinity as well as those still in their homes.........driving away polling agents is a classic symptom of graver and more widespread electoral malpractices ranging from the intimidation of electors and the seizure of polling cards to large scale impersonation.*

3. General Amendments for the Ensuring of the Right to Franchise

We recommend the following amendments to the relevant sections of the Parliamentary Elections Act, the Provincial Councils Act and the Local Authorities Elections Ordinance.

a) Section 68 of the Parliamentary Elections Act, the Provincial Councils Act and Section 81A of the Local Authorities Elections Ordinance should be amended to totally prohibit canvassing on election day etc by any person and not merely in the vicinity of the polling station;

b) Sections 74 (1) (c) of the Parliamentary Elections Act, the Provincial Councils Act and Section 81B (1) (c) of the Local Authorities Elections Ordinance should prohibit the display of public posters even on private property if visible from a public place;

c) All three laws should provide for enhanced punishments if found guilty of an offence under this section.

d) Sections 74(5) of the Parliamentary Elections Act, the Provincial Councils Act and Section 81B (5) of the Local Authorities Elections Ordinance should be amended to not only empower police officers but also impose a positive duty on them to forthwith remove illegal posters etc and to produce the offenders in court.

e) Section 79(4) of the Parliamentary Elections Act, Section 80(4) of the Provincial Councils Act and Section 81 (4) of the Local Authorities Elections Ordinance should cover not only the acts of the actual employers but also of others who threaten to terminate such employment/employment benefits. The sections should also cover termination of other rights, such as licences, contracts, subsidies and welfare payments.

It is recommended that the electoral laws under review should incorporate new amendments which are crucial to safeguarding the right to vote. These amendments may be as follows;

a) Inclusion of specific procedures to enable voting at embassies abroad by migrant workers;

b) Declaration of assets and liabilities, qualifications and disqualifications and other relevant information regarding candidates for election and elected members, should be made mandatory with adequately severe penalties (including vacation of seats) for non-compliance and false declarations.

4. Limiting The Authority of the Party Secretary when Filling Vacancies in Elected Bodies

We examine further the effect of Section 65(2) of the Provincial Councils Elections Act and Section 65A of the Local Authorities Elections Ordinance (as amended by Local Authorities Elections (Amendment) Act No 24 of 1987) on the right to franchise.

The relevant section of the Provincial Councils Act, namely Section 65(2), is as follows;

"(2) If the office of a member falls vacant due to death, resignation or for any other cause, the Commissioner shall call upon the Secretary of the recognised political party or the group leader of the independent group to which the member vacating office belonged, to nominate within a period to be specified by the Commissioner, a person eligible under this Act for election as member of that Provincial Council to fill that vacancy. If such secretary or group leader nominates within the specified period, an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation as the case may be, in the from set out in the seventh schedule to the Constitution, taken or subscribed or made or subscribed as the case may be, by the person nominated to fill such vacancy, the Commissioner shall declare such person elected as a member of that Provincial Council from the administrative district in respect of which the vacancy occurred.

If on the other hand, such Secretary or group leader fails to make a nomination within the specified period, the Commissioner shall declare elected as member, from the nomination paper submitted by that party or group for the administrative district in respect of which the vacancy occurred, the candidate who has secured the highest number of preferences at the election of members to that Provincial Council, next to the last of the members declared elected to that Provincial Council from that party or group. The Commissioner shall cause the name of the member as declared elected to be published in the Gazette."

In a recent judgement of the Supreme Court[4] the Court, (in pursuance of its duty under the Constitution, (Articles 27(2)(a) and 27(4) read with Article 4(d), to engage in the full realisation of the fundamental rights and freedoms of people and mandated accordingly to strengthen and broaden the democratic structure of government), limited the power of the secretary to nominate <u>a person eligible under this Act for election as member of that Provincial Council</u> to candidates on the nomination list, who have secured some preferences at the elections. (emphasis ours).

This judgement is in line with previous decisions of the Court, which upheld the right to vote as a fundamental right by articulating *inter-alia*, the following principles;

a) that elections should be held rather than postponed;

b) that there should be no statutory interference with the power given to the Commissioner of Elections to fix the date of elections and with the contents of nomination papers already accepted;

c) that the date of the elections should be fixed so as to facilitate rather than hinder the exercise of the right to vote;

d) that thuggery, intimidation of electors and electoral staff and ballot stuffing imposes particular duties upon the Commissioner of Elections, non compliance of which would lead to violation of the rights of electors;

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[4] *Centre for Policy Alternatives Limited v Dissanayake and Others* [2003](1) SLR 277).

e) that where citizens are prevented from exercising their right to vote as a result of decisions taken by those in authority, which decision making processes are shrouded in secrecy and are manifestly not bona fide, the right to a free, equal and secret ballot is irrevocably interfered with in a manner that cannot be justified under the Constitution.

In this particular decision, the election of a person to that particular Provincial Council was challenged on a two pronged basis; namely that he was not a person eligible for election to the Uva Provincial Council under the Provincial Councils Act No 2 of 1988, as required by the provisions of Section 65(2) of the Act, primarily on the basis that;

a) his name was not on the nomination lists submitted by his party (the Peoples Alliance) at the elections of 6th April, 1999 and;

b) in any event, he could not have been so nominated due to the fact that on the date that the said elections were held, he was a Member of Parliament and therefore disqualified from being nominated as a candidate in terms of Section 12 of the Provincial Councils Act No 2 of 1988 read with Section 3 of the Provincial Councils Act No 3 of 1987.

The contention of the petitioners (being voters who had filed the petition in the public interest) was that the rationale underlying the Provincial Council Elections Act is defined by particular key principles relating to representative democracy, a cardinal principle of which was the requirement that a person could be elected under Section 65(2) of the Act only if his or her name was on the party's nomination lists and if that person was eligible to be nominated for election to that Provincial Council.

The Supreme Court, examining the matter on appeal from a judgement of the Court of Appeal which had been adverse to the petitioners, held that the Court of Appeal had erred in law in holding that a person whose name did not appear on the nomination list submitted by the relevant political party at a Provincial Council election could thereafter be nominated by the secretary of the relevant political party to fill a vacancy that arises in the said Council. It was further held that the Court of Appeal had failed to consider the implications of Section 65(3) of the Act of 1988 for the interpretation of Section 65(2).

In the wake of the said judgement with its explicit reasoning advanced in protection of the elective principle and the right to expression thereto, it is recommended that Section 65(2) be specifically amended to incorporate the judicial thinking embodied in the aforesaid judgement of the Supreme Court.

This precedent was followed by the Court of Appeal recently in the specific context of the Local Authorities Ordinance.[5]

The Provincial Councils Act and the Local Authorities Ordinance as stated above, ought to be amended in order that a primary duty is imposed on political parties and election officials to all political parties to nominate, upon a vacancy arising, candidates whose names have appeared in the original nomination paper and who have secured some preferences at the elections.

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[5] *Masahir v Returning Office, Kegalle,* [2005](2) ALR, 37) (per Justice S. Sriskandarajah).

5. Special Issues with Regard to Local Authority Elections

Although Article 4(e) of the Constitution contemplates only presidential and parliamentary elections, the right to franchise has been acknowledged in regard to Provincial Councils as well as (by necessary inference) to local authority elections as well through judicial interpretation.[6]

Looking at the issue also from the perspective of a candidate who comes forward to solicit the said right to vote of a franchised elector, it must be borne in mind that, both the political cum constitutional right of the voter as well as any such candidate (once the party or political group he or she represents has put forward his or her name), are not rights that must be perfunctorily regarded (or disregarded).

Certain provisions of the Local Authorities Elections Ordinance as amended particularly by Act No 25 of 1990 carry the seeds of potentially suppressing the said inseparable link between a voter's right to franchise and the right of an "aspirant representative" thereby reducing to nought, not only Article 4(e) in its constitutional affinity to Article 3 of the Constitution of Sri Lanka but also Article 14(1)(a) and relevant International norms. These provisions are dealt with below.

1. Provisions of the Local Authorities Elections Ordinance (as amended by Act, No 48 of 1983 and Act, No 25 of 1990 with particular emphasis on Section 31(1) read with section 31(1)(bbb)

(1) Effect of the Sections under Review

Section 31 (1)(b) (as amended) of the said Ordinance provides that,

> *"The Returning Officer shall, immediately after the expiry of the nomination period examine the nomination paper received by him and reject any nomination paper......"*
> *(for any of the reasons set out in paragraph (a),(b),(bb),(bbb),(c),(d) (1d) and (e)"*

(2) Section 31(1)(bbb) provides that certified copies of the birth certificates of the said candidates shall be attached to the nomination paper containing the list of names of youth candidates (that is, candidates under the age of forty years). Thus, *prima facie*, the combined effect of the said two provisions would be to enable the Returning Officer to reject a nomination paper if the birth certificates attached to the said nomination paper are not certified copies. In *DM Jayaratne vs Vaas Gunewardene & Others*[7] however, the apparently mandatory language in these sections were departed from by the Court in an effort to give force and effect to the meaning of the amendment law which was to provide for youth participation in local authority elections.

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[6] Egodawela Case, supra, n 3.

[7] *DM Jayaratne v Vaas Gunewardene & Others* [2004](1) ALR, 37) (per Justice Shiranee Tillekewardene). To the same effect is the decision of the Court of Appeal in CA/336/02, CA Minutes of 28.02.2002 (Unreported). The need for legislative amendment is particularly prudent in view of the reluctance manifested by the later benches of the Court of Appeal to follow this precedent. See *Kapukotuwa v Dissanayake & Others*, CA/515/2002 – CA Minutes 10/09/2002.

(3) Need for Amendment to Section 31 of the Statute under Review

On account of the positive response shown by the Court of Appeal in the aforesaid case, the relevant section may be amended as follows;

"...the original of the birth certificate of a youth candidate, or a certified copy thereof or a photostat copy which in the opinion of the returning officer is authentic, or an affidavit....."

2. Time afforded for political parties to remedy technical defects in nomination papers

Appeals filed in the Court of Appeal in the pre-election period concerning applications disqualified by the returning officers due to technical defects relating to the nomination of one or more candidate resulting in the entire nomination list being rejected, have now become common, particularly in regard to local authority elections.

A vast majority of these applications concern challenges in regard to the impugned candidates coming within the definition of a 'youth candidate' as contemplated by Section 89 of the Local Authorities Elections Ordinance as amended *inter alia* by Act, No 24 of 1987 and Act, No 25 of 1990. Such disputes were particularly evidenced in the local authority elections of 2006 resulting in severe public dissatisfaction with the electoral process.

The petitioners' contention in all these applications were that, since the age of candidates was involved, it was a matter relating to qualifications as envisaged in Section 9 of the Local Authorities Elections Ordinance (as amended). However, the contention of the Returning Officer and other opposing parties were that, it was simply a matter of non-compliance leaving no other option for the Returning Officer but to reject the entire nomination paper upon an ocular examination of the same should the date of birth given of the candidate in question not conform to the age limit decreed by the statute, a provision introduced by the amendment of 1990 and located structurally within the framework of Section 31 and therefore, later in point of time to Section 89 of the Amending Act of 1987, thus clearly showing the legislative intention.

Consequently a meaningful distinction could be drawn between a challenge to a candidate's qualifications[7a] on the one hand and rejection of a nomination paper for non-compliance[7b] on the other, a distinction that eventually appears to have proved to be decisive in the recent local authority election cases wherein the rejection of the Gampaha Municipal Council and the Colombo Municipal Council nomination papers of the two leading political parties (among other cases) were upheld by the Court of Appeal.[7c]

It is our recommendation that, in the interests of securing full democratic participation of all parties in the electoral process which would signify that the entire list ought not be rejected for the want of single candidate, secretaries of parties ought to be given an opportunity to remedy such defects in the nomination papers (once this is brought to their attention) within a period of two days.

[7a] *Vigneswaran & Stephen V Dayananda Dissanayake & Others*, [2002] (3), SLR, 59 (CA) re the Parliamentary Elections Act, No 1 of 1981.

[7b] *Ediriweera v Kapukotuwa* [2003] (1) SLR 228.

[7c] CA/364/2006 & CA/346/2006 – CA Minutes of 24.03.2006.

6. Remedying the Negative Impact of the Proportional Representation System

The adopting of the proportional representation (PR) system in the 1978 Constitution was ostensibly as a reason of the disproportionate legislative majorities obtained by political parties on the FPTP system earlier.

Further revision of the system in the deliberations of the Select Committee during 1983-1988 led to a complex system of voting for a political party and thereafter for a maximum number of three preferences from a list of candidates nominated by the party, accompanied by cut off points and bonus seats. The focus point shifted from a single member electorate to a large district based electorate returning many members. However, Sri Lanka's experience with PR has not been wholly positive. Though massive electoral majorities in Parliament (which were earlier used by political parties to their own advantage) have been prevented as a result, the following negative factors have been evidenced;

a) Powers of political parties have become entrenched;
b) Infighting between candidates of the same political party regarding the preference vote;
c) Distancing of the political representative from his/her constituents;
d) Able candidates being deterred by the huge financial resources being necessary for electioneering in a district as opposed to an electorate;
e) No noticeable increase in the entry of women candidates though a spin off benefit of the PR system was expected to result in increased gender representation;

We take note of these concerns and suggest an amended electoral process. Specifically where local government elections are concerned, close loyalties between representatives and their constituents are necessary and a wholesale return to the ward system is recommended.

7. Provisions in regard to Elections Petitions

The current period of twenty one days specified for the filing of election petitions (Vide Section 108 of the Provincial Councils Elections Act, Section 108 of the Parliamentary Elections Act and Section 82AF of the Local Authorities Elections Ordinance is manifestly inadequate. These sections should be amended to provide for a more realistic time grame in that regard. Commensurately, there should be a thorough overhaul of election petition procedures in order to constitute an effective check on election abuses

8. Inclusion of a Gender Quota into Electoral Laws

The contemplated electoral reforms should address the question as to the manner in which women representation at parliamentary/provincial council and local government level could be strengthened. Currently, it remains at a dismal low at all levels. Percentage wise, Sri Lanka ranks lower than India, Bangladesh and Pakistan in South Asia.

The 13th Amendment itself did not contain any clauses aimed at helping women access the new political bodies, either through a reserved seat or a specific quota for nominations. The Provincial

Councils did not contain any sub-structures focussing on gender concerns nor were there any financial allocations for this purpose.

Proposals in recent years to afford women a specific percentage for nominations at local government elections, similar to the prevalent youth quota were also not implemented by successive administrations. These still remain outstanding concerns which have been noted recently by the Women's Caucus in Parliament.

The Law and Society Trust calls upon the Parliamentary Select Committee to provide for, at the minimum, a quota in nominations for women similar to the currently existent youth quota at local government level or (ideally) the reservation of a specific percentage of seats for women at local government/provincial council and parliamentary elections.

9. Ensuring Freedom of Expression and Information in the Electoral Process

The concept of informed choice involves access to (credible) information about the candidates, the parties and the process. This has been further interpreted to mean that access to the mass media should be guaranteed to political parties and candidates and that such access should be fairly distributed. In addition, particular duties and responsibilities are cast on both the media and contesting candidates in this regard. Thus;

> *"Fair media access implies not only allocation of broadcast time or print space to all parties and candidates but also fairness in the placement of timing of such access (ie; prime time versus late night broadcasts or front page versus back page publication. International standards have also stipulated that the use of media for campaign purposes should be responsible in terms of content, such that no party makes statements that are false, slanderous or racist or which constitutes incitement to violence. Not should unrealistic or disingenuous promises be made nor false expectations be fostered by partisan use of the mass media."*[8]

As far as the first part of this caution is concerned, an important part of this electoral regime is an independent body charged with monitoring political broadcasts and allocation of time thereto as well as receiving and acting upon complaints regarding media access, fairness and responsibility.

The jurisprudence of the European Court of Human Rights (ECHR) has established that a complaint about denial of access to broadcasting time could, in principle, be made out in 'exceptional circumstances' if one political party was excluded while others were given broadcasting time, where there is clear evidence of bias, arbitrariness or unjustifiable discrimination.[9]

With reference to the duties and responsibilities of the media on the other hand, (constituting as it does the second part of the right to an informed choice that voters are guaranteed), while it is clear that restrictions and penalties for non compliance may be enforced upon the media in this regard, general prohibitions in this respect cannot be tolerated.

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[8] *Human Rights and Elections*, Centre for Human Rights, the United Nations, Geneva, 1994, page 13.
[9] *Haider v Austria* (app. No 25060/94) (1995) 83 DR 66, at 74.

In accordance with these principles, particular sections of the election laws in Sri Lanka impacting on the media are analysed from a comparative perspective. We recommend that in so far as illegal practices and the media is concerned, Section 84 of the Parliamentary Elections Act, Section 85 of the Provincial Councils Elections Act and Section 82(H)(i) of Amendment Act No 1 of 2002 to the Local Authorities Elections Ordinance should be further amended in order that liability is limited to false statements of facts only.

These sections state as follows;

1) Where there is published in any newspaper, any false statement concerning or relating to-

    a) the utterances or activities at an election of any candidate or any recognised political party or independent group which is contesting such election; or
    b) the conduct or management of such election by such candidate or any such recognised political party or independent group;

and such statement is capable of influencing the result of such election, then every person who at the time of such publication, was the proprietor, the manager, the editor, the publisher or other similar officer of that newspaper or was purporting to act in such capacity, shall each be guilty of an illegal practice unless such person proves that such publication was made without his consent or connivance and that he exercised all such diligence to prevent such publication as he ought to have exercised having regard to the nature of his function in such capacity and in all the circumstances.

2) In this section, the term 'newspaper' includes any journal, magazine, pamphlet or other publication.

Though at first reading, these sections seem rational, a closer analysis would warrant a different view. Their problematic nature is well seen in the analysis of a comparable provision in the same Acts themselves (vide for example, Section 81(c) of the Parliamentary Elections Act) which limits liability to false statements of fact only. These sections make any person making or publishing a false statement of fact in relation to the personal conduct or character of the candidate for the purpose of affecting the return of any candidate at the election, guilty of an corrupt practice unless he can show that he has reasonable grounds for believing and did believe the statement to be true.

This restricted liability is borne out by the comparative section in the law of the United Kingdom (Vide Section 106 of the Representation of Peoples Act of 1983) This section also provides for interim/perpetual injunction to be issued to prevent repetition of such statement.

There are several important differences between prohibiting not any false statement but a statement of fact only. The latter prohibition does not apply to statements of opinion. This distinction has assumed a singular character in the jurisprudence of the English courts. Thus, the assertion of CIA pay mastery has been ruled to be a statement of fact; the description 'radical traitor' has been held to be a statement of opinion.

Failure to penalise false statements, (particularly in newspapers), whether relating to personal conduct or 'official' or 'political' conduct could be contended to facilitate the subversion of the voter's right to

an informed choice. It is our view that the mere condition that the statement has to be false will not prevent the working of these sections in a manner that chills the right to freedom of expression, the safeguarding of which becomes peculiarly important during election times.

Given the above, the sections in the domestic elections laws under review do not make sufficient allowance for 'false' statements of pure opinion, in as much as statements of opinion cannot be 'false' in the sense of that term as they are value judgements that cannot be measured by the barometer of truth or falsity.

This is illustrated in the English case cited above where the term 'radical traitor' was held to be a statement of opinion that was outside the ambit of the applicable section.

Likewise, the European Court of Human Rights stated in its seminal *Lingens* ruling that;

> *"A careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof...As regards value judgements, this requirement to prove their truth is impossible of fulfillment and it infringes freedom of opinion itself."*[10]

This view has been re-iterated in later jurisprudence of the Court and has now become settled law. The requirement on the part of domestic courts to prove the truth of statements of opinion has been held to infringe both the right to opinion as well as the right to expression.

In *Obserschlick v Austria*[11], the Court considered that the published complaint, stated facts followed by a value judgement and stated that the requirement that a journalist prove the truth of a value judgement is impossible and 'itself an infringement on freedom of expression." Here a majority opinion took the impugned statement by a journalist that the leader of the Austrian Liberal Party professed views that 'corresponded to the philosophy and aims of the National Socialist Party (NSDAP)", (professing such views was criminalised under Austria's Prohibition Act), as a statement of opinion with one dissent that categorised the statement as an erroneous statement of fact.

In later cases,[12] the European Court has suggested that a person should not be held liable for publishing comment, specially regarding matters of serious public concern, that are based on personal or public opinion as for example, in one instance when in calling for a new and more effective police disciplinary system, a journalist called police officers 'brutes in uniform."[13]

In the light of the foregoing, we recommend that the defences to the sections of the domestic election laws under review may be expanded to state that pure statements of opinion and/or value judgements will not be caught up within the ambit of these sections.

We also examined legislative attempts to amend these sections from a different perspective as was evidenced for example when in the year 2000, the then government in power proposed an amendment

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[10] *Lingens v Austria,* Judgement of 8 July, 1986, Series A no 103.

[11] *Obserschlick v Austria*, Judgement of 23 May 1991, Series A, no 133.

[12] *Particularly, Schwabe v Austria*, Judgement of 28 August, 1992, Series A. no 242-B

[13] *Thorgeirson v Iceland*, Judgement of 25 June 1992, Series A. no 239

to the aforesaid provision in the Parliamentary Elections Act No 1 of 1981 (as amended), leaving intact the substantive effect of the section in the definition of what was prohibited but expanding its ambit to broadcasts on radio or television. Thus, along with newspapers, licensed radios and television stations were also attempted to be brought in under the section. This amendment, in addition, attempted to stipulate that conviction of such an illegal practice would result in not only a fine and civic disabilities (as provided for by the section) but also an imprisonment term not exceeding six months.

Though presented to Parliament by the Justice Minister on 07th June, 2000, it was withdrawn by the Government following several constitutional challenges being filed in the Supreme Court and amidst heated protests by the media.

It is our considered view that, given the inherent deficiencies in the substantive content of these sections, it would be necessary to amend the said section in accordance with modern electoral norms relating to freedom of expression, prior to expanding the impact of the section to television and radio broadcasts as well. Thus, these sections should be cumulatively subject to amendment in order to prohibit false statements of fact (and not false statements in general) The due diligence defence should be retained. Once the sections are amended, the prohibition should apply, in the interests of guaranteeing fairness, to television and broadcast media as well as the print media.

10. Amendment of the 17th Amendment[14]

Appointment of the Elections Commission

As recent experience in Sri Lanka has shown, Article 41B has been substantively deficient in its functioning insofar as the appointment of the Elections Commission is concerned due to a deadlock between the members of the Council and the President regarding the recommendation of one individual as the Chairman of the proposed Commission.

In consequence, despite over three years having passed since the recommendations were made, the Elections Commission has not been constituted and the current Elections Commissioner has been virtually compelled to continue to perform in his post despite his pleas of ill health. The possibility of similar conflicts occurring in respect of other appointments specified to be made under this constitutional article is not far fetched.

We are of the view therefore that this article be amended and re-formulated as follows;

[14] Our citation of the 17th Amendment in this respect, in no way, indicates approval and/or acceptance of its substance in full. As explained in the succeeding analysis, the 17th Amendment is manifestly defective in certain of its provisions relating to elections despite the fact that it did bring about an improvement to the *status quo* as far as the fair conducting of elections is concerned. Even more fundamentally, the non-establishing of the Elections Commission, the inability to fill the remaining single vacancy to the Constitutional Council and (consequently) the recent direct presidential appointments to commissions established under the 17th Amendment shows an appalling lack of political will in implementing its basic principles.

Where the President does not approve the name(s) of any person(s) recommended by the Constitutional Council, the President may request the Council to reconsider its recommendations for reasons stated. If after reconsideration, the Council makes the same recommendation, the person recommended will be deemed to have been duly appointed if the President fails to make an appointment within one month.

Misuse of State Resources

The Supreme Court of Sri Lanka has affirmed the importance of preventing the misuse of state property by a particular government in power in a manner that violates the right of voters to ensure that their public funds are used for the benefit of all and not those of a particular political persuasion only.

In *Don Ranjith Deshapriya v Divisional Secretary, Dodangoda*[15] the rights of a Samurdhi Niyamaka who came before court on the basis that he had a right not to be used for electioneering by a political party were upheld. The question was simple. Can persons paid out of public funds, collected directly or indirectly from citizens of all shades of political opinion, be used to advance the interests of those of one political persuasion alone?

Samurdhi Niyamakas were persons performing what was described as "the major poverty alleviation programme of the government" However, it was expressly required that they should perform in a manner devoid of politics. They were officers engaged in rendering services to the public, for which they were paid out of public funds. As such, they could not be commandeered to work for one political party.

> *"...the use of resources of the State, including human resources, for the benefit of one political party or group, constitutes unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals"* the Court ruled.

The Court said specifically;

> *"Not only was free competition among beliefs thereby stifled but the profession of a particular opinion was punished by the virtual deprivation of livelihood. Democracy without dissent is a delusion. Democracy can never prohibit lawful dissent. Indeed, a fundamental characteristic of true democracy is that it not only protects dissent and tolerates it, but genuinely cherishes dissent, recognising that it is only through a peaceful contest among competing opinions that the ordinary citizen will perceive the truth."*

This prohibition would definitely apply to public funds being paid directly to one political party and not to others. It would also make no difference whether such payments are made directly to

[15] [1999] (2) SLR, 412, per Justice MDH Fernando

individuals or indirectly by diverting equipment, facilities of the State to the benefit of one political party.

However, this considerable jurisprudence has only been reflected to a limited extent in the 17th Amendment where Article 104B(4) of the 17th Amendment empowers the Elections Commission to prohibit the use of any movable or immovable property belonging to the State or any public corporation by any candidate, political party or independent group as well as for the purpose of promoting or preventing the election of the above.

This article accordingly does not regard the misuse of state property in its widest sense as including individuals in employment of the State nor could it be said to incorporeal interests.

The following amendments are recommended to the 17th Amendment;

Amendment of Article 104 B(2)

The reference in this article to "...shall be the duty of all authorities of the state charged with the enforcement of such laws, to co-operate with the Commission to secure such enforcement" should be amended to vest the duty of co-operation with all authorities of the state and not limited to only those specifically charged with the enforcement of such laws.

Amendment of Article 104B(4)

We assert that the 17th Amendment, in so far as elections are concerned, should incorporate the general principles relating to the free and fair conduct of elections, viz;

a) It is a violation of Articles 12(1) and 14(10(a) for state resources of every kind – property, personnel, media – to be used for the advantage of one political party (or to the detriment of another)

b) It is the duty of the Commissioner to ensure a free, equal and secret ballot and the due exercise of the franchise and it is the duty of the State, its agencies and officers, to provide the resources needed by the Commissioner for those purposes.]

Accordingly, we propose that Article 104B (4) should articulate these general principles.

In so far as enforcement of these provisions are concerned, Article 104B(4) (b) only imposes a vague duty on every person or officer in whose custody or control such property lies, to comply with and give effect to such direction. This should be remedied and the Commissioner/Commission be given specific powers of enforcement.

The same reasoning would apply with regard to the powers of the Elections Commissioner *vis a vis* directions that he hands out to the print media, for example, regarding balanced reporting as there is no power of compulsion of these directives as opposed to his more specific powers in the case of misuse of state resources by the electronic media.

Article 104B(4) should be amended in this regard.

Amendment of Article 104B(5)

This article should incorporate the general principle that there is a duty of fairness vested in the media in respect of its reporting during times of elections irrespective of specific directions issued in this regard by the Commission. Otherwise, the argument may well be that the duty comes into effect only pursuance to the issuing of such directions which should not be the case.

Special duties are conferred upon the state media by virtue of the fact that these are institutions run with state funds and are therefore under a particular duty to use those funds fairly for the benefit of all political parties and not merely that of the government in power. Thus, special procedures detailed under the 17th Amendment and particular duties imposed on these state media institutions under these provisions of the Sri Lankan election laws are eminently justifiable.

This same logic cannot be applied in its imperative form to private broadcasting media. Therefore, these duties should not be taken wholesale as applying to the private radio and television stations now proliferating throughout this country. However, the private broadcast and telecast media should be put under a duty of fairness in allocating broadcasting facilities during election time.

In consequence of this acknowledgement, we recommend that the 17th Amendment be further amended in order to include a new sub section which empowers the Elections Commission to determine fair allocation of broadcasting time for candidates and political parties in its discretion as far as the private broadcast and telecast media is concerned.

The said new article should further, give the Commission power move the appropriate court to censure and/or impose a fine on such station and/or apply for a restraining order on such station restraining the continuance of such contravention in the event of noncompliance with its directions.[16]

Position of the Commissioner vis a vis the Commission

Another defect in the 17th Amendment, which may hamper the effective working of its provisions with regard to the Elections Commission once it becomes fully operative is the ambiguity that it perpetuates between the Commission itself (comprising of five members) and the Commissioner General of Elections who shall, subject to the direction and control of the Commission, implement the decisions of the Commission and exercise supervision over the officers of the Commission. (Vide Article 104E(6))

The Commissioner General is appointed by the Commission, subject to the approval of the Constitutional Council. His or her removal is however problematic as Article 104E(7) provides in one clause, that it is subject to a prolonged parliamentary process while providing in another clause

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[16] In a different context, another alternative would be to prescribe conditions as regards fair allocation of broadcasting and telecasting time during elections that are applicable to all private stations and make observance of these conditions a factor that could be looked at by the body determining the issuance of licences at the relevant time. This would however, presuppose, the existence of an independent body in charge of this task which is notbly lacking currently.

that he or she could be removed by the Commissioners on account of ill health or physical or mental infirmity. It is not difficult to see the nucleus of a potential conflict between the Commissioner General and the Commission in these provisions, at a time when both are fully operative in a manner that will be akin to tussles that we have seen between the Bribery and Corruption Commission and its Director General.[17]

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[17] The situation is very different in India, for example, where there is a Chief Election Commissioner in overall control of a multi member Commission. Several disputes between the Chief Elections Commissioner and his colleagues have been taken to the courts in that country.

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Court of Appeal
Application No: 1396/2003

In the matter of an application for a mandate in the nature of writ of mandamus under article 140 of the Constitution.

1. Public Interest Law Foundation
   195 2/2 "Karlshue Court"
   Baseline Road,
   Colombo - 9.

2. Udayanthi Ramanika Seneviratne
   3/59, Melford Estate, First Lane,
   Gemunupura Kaduwella.

Petitioners

- Vs. -

1. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

2. Mrs. Chandrika Bandaranayake Kumaranatunga,
   Her Excellency the President of the Democratic Socialist Republic of Sri Lanka,
   Presidential Secretariat, Colombo - 1.

and 16 others.

Respondents

BEFORE : N. UDALAGAMA, J. (P/CA) &
K. SRIPAVAN, J.

COUNSEL : J.C. Weliamuna with S. Jayawardena and S. Senanayake for the Petitioners.

P.A. Ratnayake, P.C., Addl S.G. with A. Gnanathasa, D.S.G. and Ameen, S.C., for the first and third to thirteenth Respondents.

ARGUED ON : 28.10.2003 & 18.11.2003

DECIDED ON : 17.12.2003

K. SRIPAVAN, J.

The petitioners invoked the jurisdiction of this court seeking a writ of mandamus compelling the second respondent (President of the Democratic Socialist Republic of Sri Lanka) to appoint the fourteenth respondent as the Chairman and the fifteenth to the eighteenth respondents as the members of the Election Commission.

In view of the constitutional importance of the questions involved, without permitting the application to be supported ex-parte, this court on 4th September 2003 directed that notice be issued on the first and the third to the thirteenth respondents so that they be heard in opposition before notice is issued as prayed for in paragraph (a) of the prayer to the petition. The learned Additional Solicitor General appeared and assisted court in the consideration of the matter.

The basis of the petitioners' challenge is that consequent to the seventeenth amendment to the Constitution, the president is left with no discretion to appoint the Chairperson and the members of the Election Commission once the recommendations of the Constitutional Council is received. In this context, Counsel for the petitioners contended that the seventeenth amendment in Art. 41B removed the discretion of the President and as such the said amendment did not intend to give the President unfettered and unrestrained powers to appoint the Election Commission or not to appoint same. Accordingly, Counsel argued that the basic features contained in Art. 41B of the seventeenth amendment to the Constitution would be nullified if Art. 35 is invoked.

Article 35 of the Constitution which confers personal immunity on the President provides as follows:

> 35(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.
>
> (2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.
>
> (3) The immunity conferred by the provisions in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) (relating to the election of the President or the validity of the referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament.)
>
> Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

The reason for granting immunity to the President is succinctly stated by Sharvananda C.J. in *Mallikarachchi* Vs. *Shiva Pasupati* (1985) 1 S.L.R. 74 at 78 as follows:

> "......the President is not above the law. He is a person elected by the People and holds office for a term of six years. The process of election ensures in the holder of the office correct conduct and full sense of responsibility for discharging properly the functions entrusted to him. It is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. if such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected but the smooth and efficient working of the Government of which he is the head will be impeded. That is the rationale for the immunity cover afforded for the President's actions, both official and private."

In *Edward Francis William Silva, Presidents Counsel* Vs. *Shirani Bandaranayake (1997) 1. S.L.R. 92 at 99* the Court held "We are of the view, therefore, that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of law, more-so where the said act or omission is being questioned in proceedings where the President is not a party **and in law could not** have **been made a party**."

No doubt, in certain situations the acts or omissions of the President can be questioned in a court instituted against the Attorney-General in relation to matters referred to in Article 35 (3). Article 35 has been interpreted authoritatively by the Supreme Court in various cases. Article 41 (B) contained in the seventeenth amendment to the Constitution will have to be read subject to Article 35 in order to ensure a smooth and harmonious working of the Constitution. The cardinal rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning in construing words in a constitutional enactment. Thus, the words used in the Constitution must be understood in the sense most obvious to the common understanding. "Where the language of the Constitution is plain and unambiguous, effect has to be given to it and a court cannot cut down the scope or amplitude of such provision for the reason that notionally it cannot harmonise with the ideal of the Constitution." - per Sharvananda C.J. in *Kumaranatunga* Vs. *Jayakody (1985)2 S.L.R. 124 at 135.*

In *Karunathilaka and another* Vs. *Dayananda Dissanayake, Commissioner of Elections and others (1999) 1 S.L.R, 157 at 177* Fernando, J. observed thus:

> "I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President *while* in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity; immunity is a shield for the doer, not for the act."

Thus, it would appear having regard to Art.35 of the Constitution, an act or omission of the President is not justiciable in a court of law during the tenure of her office. Wadugodapitiya, J in the case of *Victor Ivan and others* Vs. *Hon. Sarath N. Silva and others (2001) 1 S.L.R. 309 at 327* interpreting Art. 35 laid down the objective and the intention of the framers of the Constitution in the following words:

"I am constrained to say that, in fact, what the Petitioners are asking this court to do, is in effect to amend by judicial action, Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This, of course, is not within the power of this Court to do. In the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned."

Following the judicial decisions quoted above, I hold that Article 35 gives a blanket immunity to the President from having proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity, except in circumstances specified in Article 35(3). The present application does not fall within the ambit of Article 35(3). As observed by Sharvananda C.J. in *Mallikarachchi's* case "the Attorney-General cannot be called upon to answer the allegations in the petitioner's application. He does not represent the President in proceedings which are not covered by the proviso to Article 35 (3), and is not competent or liable to answer the allegations in the petition." The power to appoint a Chairperson and the members of the Election Commission is expressly conferred on the President who alone can make such appointments in terms of Article 41B of the Constitution as introduced by the seventeenth amendment. Thus, I hold that the petitioners have erred in citing the Attorney-General as the first respondent to this application. The application is therefore not properly constituted and fails on that Ground as well.

For the reasons stated above, notice on the respondent is refused.

Sgd.

JUDGE OF THE COURT OF APPEAL

N. UDALAGAMA J.

I agree.

Sgd.

JUDGE OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for mandates in the nature of writs of certiorari, mandamus and / or prohibition in terms of Article 140 of the Constitution.

1. Dr. A.C. Visvalingam,
   President Citizens Movement for Good Governance (CIMOGG),
   275/75, Stanley Wijesundera Mawatha
   Colombo - 7

2. Susil Sirivardana
   President, Avadhi Lanka,
   275/75, Stanley Wijesundera Mawatha
   Colombo – 7

Petitioners

Court of Appeal
Application No: 668/2006

Vs.

1. The Hon. Attorney General,
   Hulftsdorp, Colombo 12.

2. Lalith Weerathunga,
   Secretary to H.E., the President
   Presidential Secretariat, Colombo - 1.

And 39 others.

Respondents

BEFORE : K. SRIPAVAN, J.

COUNSEL : Elmore Perera for the Petitioners.
N. Pulle S.S.C for the 1st, 2nd, 23rd, 26th and 35th respondents.
A.S.M. Perera P.C with Daya Pelpola and Johnthasan for the 5th respondent.

ARGUED ON : 5th, 10th, 19th, 23rd, 26th and 30th May 2006

DECIDED ON : 2nd June 2006

K. SRIPAVAN, J

The first and the second petitioners are the President and a member of the Citizens Movement for Good Governance respectively and are citizens of Sri Lanka. The main complaint of the petitioners is that the President sidestepped the Constitutional Council and appointed the 26th to 41st respondents as members of the Public Service Commission and the National Police Commission. On this basis, the petitioners seek a writ of Certiorari to have the appointments of the 26th to 41st respondents quashed. It is observed that the impugned decisions of the President are not before this court.

The petitioners in paragraph 2 of the petition averred that the first respondent has been made a party to this application in view of the immunity conferred on the President by Article 35(1) of the Constitution. Clause 3 of the Court of Appeal (Appellate Procedure) Rules 1990 specifically provides that every application made by a petitioner shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Thus, the petitioners are under a legal duty to annex the impugned documents to the petition which are material to this application. Failure to comply with the Rules disentitle the petitioners to obtain relief from this court and in fact, this court cannot and will not quash the appointments made by the President which are not before court. It is also noted that the President who made the impugned appointments is not a party to this proceedings and cannot be made a respondent under Article 35(3) of the Constitution.

One of the principles of natural justice is that a man's defence must always be fairly heard before a decision is taken which adversely affects him. The violation or non-observance of natural justice will make a decision void. Legal representation before a court is an elementary feature of the fair dispensation of justice. Therefore, the question that comes up for consideration is whether the court could quash the decision made by the President when the President is not a party to this application. It is fundamental that in an application for a writ of certiorari, the party against whom relief is sought should be identified clearly. In this regard, it may be relevant to quote the following observations made by Sharvananda, CJ who delivered the majority judgment in the case of *Mallikarachchi* vs. *Shiva Pasupati, Attorney General (1985) 1 S.L.R. 74 at page 80*.

> "The Petitioner has erred in citing the Attorney General as respondent to his petition. The Attorney General cannot be called upon to answer the allegations in the petitioner's application. He does not represent the President in proceedings which are not covered by the proviso to Article 35(3) and is not competent or liable to answer allegations in the petition ...... The application of the petitioner is not properly constituted and therefore fails in limine."

A similar approach was adopted by a bench of five Judges of the Supreme Court in the case of *Victor Ivan* and others vs. *Hon. Sarath N Silva and others (2001) 1 S.L.R. 309 at page 327* in the following words.

> "I am constrained to say, that, in fact what the petitioners are asking this court to do, is in effect to amend, by judicial action, Article 35 of the Constitution by ruling that the immunity enjoyed by the President is not immunity at all. This of course, is not within the power of this court to do. In the guise of judicial decisions and rulings, Judge cannot and will not seek to usurp the functions of the Legislature especially where the Constitution itself is concerned."

This court in the case of *Public Interest Law Foundation* vs. *The Hon. Attorney General (CA Appl 1396/ 2003 – C.A Minutes of 17.12.2003)* having considered Article 35 of the Constitution in the light of the aforesaid Supreme Court decisions made a pronouncement that Article 35 gives a **blanket immunity to the President** from having proceedings instituted or commenced against him in any court in respect of **anything done** or omitted to be done in his official or private capacity except in circumstances specified in Article 35 (3). (Emphasis added) This judgment was delivered after the seventeenth amendment to the Constitution came into operation. The special leave to appeal sought against this decision of the Court of Appeal was refused by the Supreme Court on 6th July 2004 in S.C (Spl) L.A. No. 34/2004. Therefore this court is bound by the abovementioned decisions of the Supreme Court.

Learned Counsel for the petitioners argued that the impugned decisions were contrary to Article 41B of the seventeenth amendment and therefore cause injustice to the people. This court is mindful that no citizen including the President is above the law. However, the words "anything done...... in his official or private capacity" used in Article 35 must be given a meaning in accordance with the intention of Parliament. The intention of this Article is to be gathered from the words used therein. If the words are plain and clear, effect will no doubt, be given to those words. Accordingly, it may be appropriate to consider the remarks made by Shirani A. Bandaranayake, J in the case of *Hon. Attorney General* Vs. *Janathpriya Thilanga Sumathipala (S.C. Appeal No. 82/2004 – S.C. Minutes of 29.03.2006)* in the following manner.

> "A judge cannot under a thin guise of interpretation usurp the function of the Legislature to achieve a result that the judge thinks is desirable in the interests of justice. Therefore the role of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every judge is to do justice within the stipulated parameters. Referring to the function of a judge, justice Dr. Amerasinghe was of the view that (Judicial Conduct, Ethics and Responsibilities Pg 284) the function of a judge is to give effect to the expressed intention of Parliament. If legislation needs amendment because it results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years."

"Admittedly, the law sometimes forces an unjust decision. If there is no way about it, it is for Parliament to alter the law, if the injustice merits an alteration." – per Shirani A. Bandaranayake, J. Therefore injustice, if any caused to the people as alleged by the counsel for the petitioner cannot be cured by this court as it is for the legislature to make necessary amendments to the Constitution.

The petitioners seek a writ mandamus on the fourth respondent to cause the Member of Parliament of all political parties other than the SLFP and the UNP to nominate by consensus or by election, a person of eminence to serve on the Constitutional Council. Mandamus will lie to any person who is under a duty imposed by statute to do a particular act. It commands the person to whom the said writ is addressed to perform some legal duty which he has refused to perform. Article 41A(f) of the Constitution does not impose any legal duty on the fourth respondent. If the Members of Parliament belonging to the minority parties fail to nominate a person by consensus, this court cannot issue a writ of mandamus to compel them to do so. These are matters falling within the scope of Parliament and cannot be interfered with by courts. His Lordship the Chief Justice while examining the Bill titled "The seventeenth amendment to the Constitution" in S.C Determination No. 6/2001 succinctly stated

that "even though the President is bound to forthwith make the appointments upon receipt of the nominations of the Prime Minister and the Leader of the Opposition in terms of Article 41A (l) (e), they are matters of legislative policy within the purview of Parliament." On the same line of reasoning, it would be impracticable and undesirable for the court to embark upon an inquiry in order to ascertain whether in a given situation the procedure laid down in Article 41A (l) (f) was effectively followed.

The petitioners further seek a writ of mandamus on the first and the second respondents to cause to be duly appointed to the Constitutional Council the eighth to twelfth respondents and the representative to be elected by the members of the minority political parties. As I remarked earlier this court has no jurisdiction to compel the first and the second respondents to cause to be duly appointed the eighth to twelfth respondents to the said Council when in fact they do not have any statutory or constitutional power to do it. Mandamus of course will not lie to compel the performance of a moral duty as opposed to a legal duty.

The writ of prohibition demanded by the petitioners against the 26th to 41st respondents is a consequential relief. Prohibition is generally issued to forbid some act or decision which is ultra vires. If the court is unable to quash the impugned appointments of the 26th to 41st respondents, then it cannot possibly prohibit such respondents from functioning as members of the relevant commissions. For these reasons, the court is of the view that the petitioners cannot ultimately succeed in obtaining the substantial reliefs sought in this application. Therefore, the interim reliefs prayed for in terms of paragraphs (f) and (g) of the prayer to the petition are refused.

JUDGE OF THE COURT OF APPEAL

COURT JUDGMENTS, EC DECISIONS AND CONTROVERSIES OVER THE ELECTORAL ROLL

Dr. Badiul Alam Majumdar*

The Bangladeshi Election Commission's (EC) decision of June 12, 2006 to revise the electoral roll, (supposedly as per the recent decision of the Supreme Court) has evoked a great deal of controversy. Some legal experts have argued that the EC's decision not to send enumerators from door to door and to use its own offices and functionaries for revision are inconsistent with both the law and the Appellate Division's judgment. Some election experts also raised serious questions about the wisdom of the EC's decision. They argue that the revision contemplated by the EC would keep many eligible voters out and include many fictitious ones, making the revised electoral roll utterly unreliable. Are these concerns justified?

The Background

Justice MA Aziz, after becoming the Chief Election Commissioner (CEC) last year, stated publicly that *The Electoral Rolls Ordinance, 1982* allows only revision of the electoral roll and preparing the electoral roll afresh would require amending the law. Nevertheless, the EC decided in its meeting of August 6, 2005 to prepare a fresh electoral roll as per section 7(7) of the Ordinance to make it "completely error free". In reaction, this author wrote an article in the *Daily Prothom Alo* (September 16, 2005) presenting both legal and economic arguments for revision of the electoral roll.

Subsequently, the two Election Commissioners Messrs M. M. Munsef Ali and A. K. Mohammad Ali stated publicly that the decision to prepare a fresh electoral roll was taken unilaterally by the CEC over their objections. Following these public objections, this author wrote both in *The Daily Star* (December 6, 2005) and *Prothom Alo* (December 17, 2005) that the EC is a composite body and the Commissioners must make decisions either unanimously, and in case of difference of opinion, by majority vote. Later three Members of Parliament – Alhaj Advocate Rahmat Ali, Mr. Abdul Jalil and Mr. Asaduzzaman Noor – filed two writ petitions before the High Court Division of the Bangladesh Supreme Court challenging the preparation of a fresh electoral roll, allegedly by the unilateral decision of the CEC.

The Court Judgments

On January 4, 2006, a Division Bench of the High Court held that the EC is indeed a composite body and it must act collectively. However, the Court found that the Commission's decision of August 6, 2005 to prepare the electoral roll was not unilateral. More importantly, the Court directed that:

> *"(III) The Commission should prepare Electoral Roll taking the existing Roll maintained under section 7(6) of the Ordinance as a major basis. If there is a computerized database the Commission should make the best use of it and if not, a computerized Electoral Roll with database should always be maintained to avoid future controversy, costs and labour.*

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* Senior academic and writer, Global Vice President of The Hunger Project (2003), currently Secretary, Shujan – Shushannar Joinno Nagorik (Citizens for Good Governance), Bangladesh

(IV) The persons whose names are already in the existing electoral roll cannot be dropped from that roll unless they are dead or have been declared to be of unsound mind or ceased to be residents or ceased to be deemed to be residents of that area or the constituency."

The EC appealed against these two directives while continuing to prepare the new electoral roll. On May 23, 2006, the Supreme Court dismissed the appeal and upheld the earlier judgment with slight modifications. The only significant additional factor in its judgment related to the direction that those who are below the age of 18 or have ceased to be citizens of Bangladesh *inter alia,* be deleted from the existing roll. The Court provided a "legal guideline" for the deletion of names in the said context. In specific terms, the Appellate Division directed the EC as follows:

(III) "The Commission should prepare Electoral Roll taking into consideration of the existing Roll maintained under Section 7(6) of the Ordinance. If there is a computerized database the Commission should make the best use of it and if not, a Computerized Electoral Roll with database should always be maintained to avoid future controversy, costs and labour."

(IV) "The persons whose names are already in the existing Electoral Roll cannot be dropped from that Roll unless they are dead or have been declared to be of unsound mind *or less than 18 years of age or ceased to be a citizen of Bangladesh; or ceased to be deemed by law to be residents of the electoral area/constituency. The Commission, if occasion arises for dropping the name from the existing Electoral Roll then shall do the same following the procedure as laid down in Sub Rules (3) and (4) of the Rule 20 of the Electoral Rolls Rules, 1982.*" (The clauses in italics are the additions of the Appellate Division.)

The SC judgment settled the controversy as to whether a new electoral roll should be prpared or whether the roll should be revised. The Court unequivocally directed the revision of the existing electoral roll prepared in 2000. In fact, it held that the Commission is in no way authorised to prepare a fresh electoral roll for all electoral areas or constituencies upon disposing of the already existing roll preserved under 7(6) of the said Ordinance since there are provisions for amendments, corrections and revisions of the same. Thus, the Court directed continuity of the electoral roll and maintaining it in the form of a computerised database.

In order to determine whether the EC fully complied with the said directives of the Court, one must carefully read the judgment in conjunction with the *The Electoral Rolls Ordinance, 1982.* Justice Amirul Kabir Chowdhury, who wrote the main judgment, directed the Election Commission to "prepare the Electoral Roll taking into consideration the existing Roll under section 7(6) of the Ordinance." He then provided a guideline to delete names from the existing roll in accordance with rule 20 and sub-rule 3 and 4 framed under the said *Ordinance.* The other four Justices, including the Chief Justice, concurred with these directives.

Rule 20, sub-rule 3 and 4 state: *"(3) Where, at any time, any clerical, printing or other error in any entry in any electoral roll for the time being in force comes to the notice of the Registration Officer, he may, on his own motion and after giving notice to the person to whom the entry relates, correct such error ... (4) If at any time it appears to the Registration Officer that the name of the person who has died or is or has become disqualified for enrolment or who ceases or cannot claim himself to be a citizen under the provision of any law relating to*

the citizenship of Bangladesh has been included in an electoral roll and if he is satisfied after giving notice to the person concerned and after making such enquiry as he may consider necessary that the name should be deleted, he shall amend the electoral roll accordingly: Provided that the Registration Officer may, upon consideration of an application in form-9 made by any person in this behalf, also amend the electoral roll for reasons stated in this sub-rule."

It should be clear from the above that although Justice Chowdhury provided a guideline for **deletion**, he offered no guidance as to how to **prepare an electoral roll for the upcoming election taking into consideration the existing roll**. Justice Md. Tafazzul Islam remedied this void by directing that "before the 9th Parliamentary election it is the existing electoral roll, i.e., the electoral roll of 2000, with some additions, deletions and modification as may be necessary, that is to be published as draft electoral roll." The other three Justices, Chief Justice Syed J. R. Mudassir Husain, Justice M. M. Ruhul Amin and Justice Md. Ruhul Amin, concurred with this guideline. It is thus clear that Justice Islam's additions contain a critical supplement to the main judgment written by Justice Chowdhury.

In order to understand the significance of Justice Islam's additions, one must clearly understand the stages in the preparation of electoral roll. Justice Islam himself specified the stages as: "(1) preparation of the draft electoral roll, (2) after making addition or modification or correction in the draft electoral roll publication of the final electoral roll, (3) maintenance of the final electoral roll in the prescribed manner and keeping it open for public inspection, (4) addition, modification and correction of the final electoral roll, (5) revision of the existing electoral roll and preparation of subsequent electoral roll after revision."

Justice Islam elaborated the procedure involved in the fifth stage: "At the fifth stage in terms of section 11 read with rule 21, unless otherwise directed by the Election Commission, before each election to an elected body, the electoral roll shall be revised and if directed by the Election Commission, the electoral roll shall also be revised in any year." (note the word 'shall') Section 11(1) of the *Ordinance,* which related to revision, states: "The electoral roll shall,– (a) unless otherwise directed by the Commission for reasons to be recorded in writing, be revised in the prescribed manner by reference to the qualifying date before each election to an elective body."

Thus, it is clear that unless otherwise decided by the Commission in writing, it is mandatory by law to revise the existing electoral roll before each election to an elective body.

Stages in the Preparation of Electoral Roll

Stages	Tasks involved	Sections	Rules	Forms used	Type of revision	Comments
Stage 1	Preparation of draft electoral roll by collecting information through door to door visits by enumerators	7(1)	1, 3, 4, 5, 6, 19	2, 3		Fresh electoral roll can be prepared only for specific areas or constituencies after cancellation for gross error or irregularity in or in the preparation of of the existing roll

Stage 2	Publication of the final electoral roll after revision	7(2), 7(3), 7(4), 7(5)	6 to 18	4, V, VI	Minor revision	To be done in two weeks under Revising Authority
Stage 3	Maintenance of the final electoral roll	7(6)	19A, 28			Maintenance of the roll
Stage 4	Continuing revision of the final electoral roll	10, 13, 15	20	2, 7, 8, 9	Minor revision	Continuing revision, though not permissable after notice of election. Revision under section 15 needs Commission's authorisation.
Stage 5	Preparation of the next electoral roll before the next parliamentary election	11	21	1, 2, 3	Major/ special revision	Compulsory unless otherwise decided by the Commission with written reasons. Same procedure as stage 1

Rule 21(1) of the *The Electoral Rolls Ordinance, 1982* elaborates the procedure: "For the purpose of revision of the electoral roll for any electoral area, the electoral roll of the electoral area for the time being in force shall, with such additions, deletions and modifications as may be necessary, be published as draft electoral roll in the manner provided in rule 6 and thereupon the provisions of rules 7 to 18 shall apply in relation to every such roll as they apply to the first preparation of an electoral roll for an electoral area."

Accordingly, Justice Md. Tafazzul Islam directed that prior to the next parliamentary elections the existing electoral roll will have to be revised and published as a draft electoral roll for the sake of continuity. (quoted earlier) As noted earlier, Chief Justice Syed J. R. Mudassir Husain, Justice M. M. Ruhul Amin and Justice Md. Ruhul Amin concurred with this direction.

It must be noted that the publication of the draft electoral roll requires enumerators to go from door to door for collecting information under section 7(1) rules 3, 4 and 5, and then publishing it under 7(2) rule 6 of the said *Ordinance* inviting claims and objections. Once the draft roll is published, it must be added to, modified and corrected using the procedures laid out in sections 7(3) rules 7 to 17 before publishing it as the final electoral roll under section 7(4) rule 18 of the *Ordinance.* Thus, it seems that the procedure for the "revision" under section 11 is the same as the procedure for the "first preparation of the electoral roll" under 7(1) of the statute. The only difference between the two appears to be that while the revision must be done for the entire country, the first preparation is applicable to individual electoral areas or constituencies for gross errors or irregularities in or in the preparation of the electoral roll.

It is clear from the above that in order to fully abide by the SC judgment, the EC will have no alternative but to send enumerators from door to door for collecting information. In fact, even without the Court judgment, it is mandatory for the Commission to do so, which is required under section 11(1) of the Ordinance. It may further be noted that with the revision, the procedures specified for deletion under rule 20(3)(4) by Justice Amirul Kabir Chowdhury in the main judgment, becomes less important.

The EC Decisions

Newspaper reports were to the effect that the EC, in its meeting of May 12, had decided to amend and correct the existing electoral roll during the month of July in accordance with rule 20 framed under The Electoral Rolls Ordinance, 1982. Thus; "Nearly 6,400 Registration/Assistant Registration Officers will be used for this purpose. The Commission will not send enumerators from door to door for collecting information. The Commission has also decided to prepare a supplementary electoral roll rather than make changes and additions to the existing roll."

From a careful review, it appears that while the Commission's position is consistent with the guideline provided by Justice Amirul Kabir Chowdhury, it totally ignored the important additions made and the guideline provided by Justice Md. Tafazzul Islam, with whom three other three Justices concurred. It also totally disregards the revision needed as per law prior to the election of an elective body. We are not aware of any decision by the Commission not to revise the existing electoral roll, as required under section 11 of the Ordinance. Thus, the EC's decisions appear to violate both the law and the Court directives.

However, the EC's decisions are "convenient" for the Commission. The decisions are convenient in that the planned updating can be completed within a short period (31 days are earmarked for it) and with little cost – the Commission is already under severe criticism for squandering away a large sum of money and time. Thus, the decisions will serve the Commission well.

Although the EC's decisions are convenient and will serve the Commission well, they will not serve the cause of preparing a dependable electoral roll, which is an essential prerequisite for fair elections. It fact, the practicality and wisdom of the Commission's decisions can be seriously questioned. The decision is impractical because it is not conducive to preparing a reliable electoral roll. Nearly six years have elapsed since the existing electoral roll was prepared and many young citizens became eligible to become voters and many lost their eligibility because of death and other reasons. By the EC's own account, as revealed by the electoral roll rejected by the Court, 1.75 crore voters increased between 2000 and 2006.

Furthermore, the EC is on record in saying that the 2000 electoral roll contained 65 lakhs of fake (or false) voters. It will be impossible to effect these huge corrections in order to make the electoral roll reasonably reliable with only 6,400 functionaries within the one month time limit specified by the Commission, although under Articles 119 and 122 of the Constitution the EC is obliged to enroll every eligible citizen as a voter. It is also unreasonable to expect that the vast number of our illiterate voters will travel miles to go to local Election Offices to include their names, request corrections or lodge objections – such a culture has not yet developed in our country. In addition, this sort of updating may create unprecedented opportunities for including fake voters in the supplementary roll. Furthermore, it should be noted that the continuing, routine updating envisaged by rule 20 of the *Ordinance* does not have a time limit. Another source of serious concern arises from the fact that last year the government appointed 301 new Thana Election Officers, allegedly based on partisan considerations, and these officers will be in the thick of the updating process to be carried out. Thus, there appears to be genuine justifications for criticisms expressed in relation to the EC's decisions.

One can also challenge the validity of the continuation of the Registration and Assistant Registration Officers appointed during the preparation of the fresh electoral roll for the new task. It may be recalled that the writ petition of the three MPs challenged the legality of their appointments. Would not the High Court and Supreme Court judgments invalidating the preparation of fresh electoral roll also invalidate the appointments of those who were doing the job?

The EC's decision to prepare a supplementary roll rather than making changes in the existing electoral roll prepared in 2000 also begs serious questions. In fact, the law provides for no such supplementary roll. Rule 20(6) clearly states as follows;

> "When an electoral roll has been amended under this rule by the Registration Officer, corresponding amendment or correction shall be made in the copy of the electoral roll in his custody as well as in the copies of the rolls kept at other places under rule 22."

The preparation of supplementary roll would mean that the names of the fake and ineligible voters will remain in the already existing electoral roll and its users will face nightmarish experiences. There will also be complications for future revisions. In addition, the existing electoral roll will not be "correct" since the age of the voters will not be updated. Furthermore, the Court had directed the preparation and maintenance of a computerised database and had pointed out that there should be one updated database rather than two separate ones. The names of voters by household, irrespective of whether male or female, should be in the electoral roll together, and if the database is properly prepared, they can be easily separated with a simple command. None of these directions will now be implemented.

Given these practical considerations, aside from the Court directions and the legal requirements, the EC should initiate revisions under sections 11 and rule 21 of the *Ordinance.* This may be done quickly and with reasonable costs if the local body representatives and other social leaders are involved in the process. Furthermore, the overriding concern should be to prepare the most reliable electoral roll rather than the cost of doing so. In addition, we must take up the idea of issuing the identity cards, required by section 11A of the *ordinance*, and with technical advancements in digital photography it may not be very difficult to issue identify cards while doing a revision.

Another practical matter is that the proposed updating could perhaps be made reasonably successful if there was political consensus prevailing in the country. In other words, if the political parties would come forward to help with the revision and would mobilise their own forces for this purpose, the task would become much easier whilst imparting more credibility to the functioning of the EC.But the opposition political parties have already declared their opposition to the EC's decisions and are committed to fighting the EC's every move. Certainly, this is not a conducive political climate for the type of updating planned by the EC.

In addition to the political opposition, many thoughtful citizens in Bangladesh are also very critical of the EC. Many of them view the Commission as a partisan body which is not capable of conducting free and fair elections. In fact, some even contend that the Commission itself, as it is constituted now, poses the biggest obstacle to free and fair elections. Past decisions of the Commission and the personal behaviour of some of the Commissioners have only created new controversies deepening these doubts. For example, the position taken by the CEC that the High Court directives of May 2005

for disclosures by candidates contesting in parliament elections are *directory*, rather than *mandatory*, is without legal basis. Similarly, contempt proceedings are already underway for the EC's defiance of the High Court judgment. Thus, the Commission appears to have lost the trust and confidence of a large proportion of our population and the three Commissioners are subjected to constant ridicule and derision by the media. In fact, the Commission has become a laughing stock in the eyes of many. This undermines the very credibility of the institution created by our Constitution for holding free and fair elections and is detrimental to our democratic process.

To conclude, free, fair and impartial elections are preconditions for a true democratic system. However, fair elections require reliable electoral rolls. Bangladesh is now facing a serious challenge to the task of preparing a credible and reasonably reliable electoral roll for the conducting of elections. This has proved to be an unnecessary stumbling block for holding parliamentary elections on time. The problem arises from the EC's defiance of both the law and the judgment of the court.s Thus, it is clear that the EC is incapable of carrying out its constitutional mandate of holding free, fair and timely elections. It is therefore necesarry that, in order to restore public trust and confidence in the Commission, the three Commissioners should resign immediately and be replaced by competent individuals on the basis of political consensus so that the current stalemate can be resolved for the betterment of the country's democratic future.

THE PEOPLE
VS.
THE FEDERAL ATTORNEY-GENERAL

In the Matter of the Independence of Nigeria's National Human Rights Commission
A Report By The Nigerian Human Rights Community
12 July 2006

Executive Summary

As a condition for its election to the United Nations Human Rights Council in May 2006, Nigeria pledged "its determination and commitment to continue to promote and protect human rights at home by strengthening and actively supporting the work of the National Human Rights Commission."

On Monday 19 June, 2006, the first day of the inaugural Session of the newly constituted United Nations Human Rights council, Nigeria's Federal Attorney-General and Justice Minister, Bayo Ojo SAN, through a letter signed by the Director of Personnel in the Ministry, Mr. A.S. Durojaiye, directed the "re-deployment" back to the Ministry of Mr. Bukhari Bello, Executive Secretary of the Nigerian National Human Rights Commission (NCHR). The Minister issued no public reasons for this decision. It subsequently emerged that in a private meeting with Mr. Bello 48 hours before the "re-deployment", the Minister had told Mr. Bello that the government was unhappy with the tone and vigour of his criticism of government's poor human rights record.

These events crystallised the severe deterioration in Nigeria's human rights situation, which accelerated with the onset of the failed attempt to prolong the tenure of the government of President Olusegun Obasanjo.

The decision to "re-deploy" Mr. Bello was vigorously denounced both within and outside Nigeria as egregious interference with the independence of the National Human Rights Commission. The Special Representative of the United Nations Secretary General on Human Rights Defenders, Hina Jilani, and the Special Rapporteur of the African Commission on Human and Peoples' Rights on Human Rights Defenders, Reine Alapini-Ginsou, jointly condemned Mr. Bello's removal as "usurped Presidential reprisal for his critical work in the defence of human rights."

The Justice Minister and federal Attorney-General does not have the power in law to sack the Executive Secretary or interfere in the work of the NCHR. Faced with unanimous domestic and international condemnation of his decision, the Minister compounded his abuse of power by resorting to smears and intimidation. Two weeks after the letter "re-deploying"

Mr. Bello, the Minister announced that he would investigate hitherto undisclosed and still unsubstantiated allegations of misconduct against him but admitted that he had chosen not to bring these allegations to Mr. Bello's attention. Without alleging any crimes against him, the Minister wrote to direct the Inspector-General of Police to arrest Mr. Bello if he showed up on the premises of the Commission. In response to this directive, the Inspector-General deployed 14 Police officers to the Commission. Simultaneously, the Minister's Press Secretary visited senior journalists and editors in

Lagos to lobby for publication of the Ministerial smears against Mr. Bello, asking them to "go easy" on the Minister.

This report chronicles how, in the matter of the NCHR, Mr. Bayo Ojo, SAN, as Nigeria's Federal Attorney-General and Justice Minister has committed abuse of power, powers, compromised the credibility and effectiveness of the Commission, mis-led Nigeria into violating the United Nations (Paris) Principles on the independence of National Human Rights Institutions, and done incalculable damage to the largely successful efforts of the administration of President Olusegun Obasanjo to redeem Nigeria's international reputation. It concludes that the Minister has lowered the authority and esteem of the high office of Minister and Attorney-General. As a result, he has become a liability to the federal government and, in the circumstance, his position has clearly become untenable.

The report recommends an urgent and independent public inquiry into the serious allegations of abuse of power against the Minister of Justice and Federal Attorney-General. Pending this inquiry, Mr. Bayo Ojo, SAN, should stand down as Attorney-General or, if he fails to do so, be relieved of his position in the public interest.

Introduction: A Routine Re-Deployment?

As a condition for its election to the United Nations Human Rights Council in May 2006, Nigeria pledged "its determination and commitment to continue to promote and protect human rights at home by strengthening and actively supporting the work of the National Human Rights Commission."[1]

On Monday, 19 June 2006, the first day of the first Session of the newly established United Nations Human Rights Council, Mr. A.S. Durojaiye, Director of Personnel Management in Nigeria's Federal Ministry of Justice, wrote to Mr. Bukhari Bello, Executive Secretary (and Chief Executive Officer) of Nigeria's National Human Rights Commission (NCHR) purporting to re-deploy Mr. Bello back to the Federal Ministry of Justice. The letter ordered Mr. Bello to vacate his position as Executive Secretary immediately and to hand over his responsibilities to the senior most officer in the Commission. Mr. Durojaiye's letter was written under the instructions of Nigeria's Federal Justice Minister and Attorney General, Mr. Bayo Ojo, SAN. On its face, the letter gave no reasons for the re-deployment.

This Ministerial decision crystallised the severe deterioration in Nigeria's human rights record, which accelerated with the onset of the failed attempt to prolong the tenure of the government of President Olusegun Obasanjo. Across the country, there is a widespread belief that "a process of vengeance against political enemies and the media" has begun, resulting in serious violations of human rights and, especially, repression of political participation, free expression, association, and public assembly 2 and dissent.[2] The attack on the independence of the National Human Rights Commission diminishes the prospects for securing effective protection against these violations and suggests that the government may be planning an escalation of human rights abuses.

This report chronicles the facts of how Nigeria's Justice Minister compromised the independence of the NCHR, attempted to force out of office the Executive Secretary of Nigeria's NCHR, and

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[1] International Service for Human Rights, Press Release, 23 June 2006
[2] Isioma Madike, "Casualities of Third Term", Sunday Independent, 9 July 2006, Pages B9-B11.

orchestrated egregious violations of the commitments it made prior to its election to the United Nations Human Rights Council. It provides details of the background to the decision by the Minister, its motives, the reactions that followed it, and the legal and institutional context showing that the purported removal of the Executive Secretary was both unlawful and an abuse of power.

A Ministerial Invitation

The alleged re-deployment of Mr. Bello followed his meeting with the Justice Minister at the latter's request and in his official residence in Abuja on the evening of Saturday, 17 June 2006. At the meeting, the Justice Minister informed Mr. Bello that he had asked to see him out of courtesy for the many years in which he had known Mr. Bello in other capacities. He told Mr. Bello that the President of Nigeria was unhappy with him and had requested the termination of his appointment for three reasons, namely:

- A press briefing by the Executive Secretary criticizing numerous incidents of disobedience of court orders by the Federal Government and its agencies, and harassment and intimidation of the media and journalists by Nigeria's security agencies. The Council of the NCHR requested the Executive Secretary to address this press conference at its meeting Benin, Edo State, in May 2006.

- A statement read by the Executive Secretary on 11 May 2006 at the 39th Ordinary Session of the African Commission on Human and Peoples' Rights in May 2006, in his capacity as Chairperson of the Co-ordinating Committee of African National Human Rights Institutions and on their behalf, condemning sit-tight African leaders and denouncing " African leaders who are not military men but using constitutional amendments to perpetuate themselves in power."[3]

- A recent statement by the Executive Secretary reiterating the position of the United Nations High Commissioner for Human Rights that the Guantanamo Bay detention facility was incompatible with the obligations of the United States of America under international law to ensure protection of human rights protect human rights, and should be closed.[4]

In response, Mr. Bello reportedly informed the Attorney-General of the mandate of the National Human rights Commission (NCHR), to "deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the African Charter, the United Nations Charter and the Universal Declaration of Human Rights, and other international treaties on human rights to which Nigeria is a signatory.[5]" He said he believed that it was the responsibility of the Justice Minister to explain, uphold, and defend the functions and independence of the Commission in government. Replying, the Attorney-General reportedly told Mr. Bello that he should have been "diplomatic" in criticising human rights violations by government. In closing the

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[3] Ise-Oluwa Ige, Innocent Anaba & Abdulwahab Abdullah, "Nigeria: Civil Society/NGOs Petition African Rights Commission" Vanguard, 30 June 2006, available at, http://allafrica.com/stories/200607010061.html, visited 5 July 2006. Tobi Soniyi, "FG Re-Deploys Rights Commission Boss", The Punch, June 20 2006, page 9.
[4] *Ibid.*
[5] National Human Rights Commission Act, No.28, 1995, Section 5(a).

encounter, the Justice Minister advised Mr. Bello to expect a letter conveying the termination of his appointment on Monday.

Protest by Chairperson of NCHR

The Justice Minister did not give prior notice of his decision nor of Mr. Bello's alleged re-deployment to the Council of the National Human Rights Commission chaired by recently retired Supreme Court Justice, Francis Iguh. On hearing of the alleged redeployment, Justice Iguh promptly travelled to Abuja from his residence in Onitsha, Anambra State, in South Eastern Nigeria, where, on the afternoon of 19 June, he met with the Justice Minister to protest the Minister's interference in the independence of the Commission. Justice Iguh also reportedly explained to the Minister that, in respect of the activities over which the Minister had communicated concerns to Mr. Bello, the Executive Secretary acted in fulfilment of the mandate of the Commission and with the support and instructions of its Council. In reply, the Justice Minister reportedly informed the Chairperson that he would consult the President and convey a response to the Chairperson of the Commission before embarking on previously scheduled international travel on the evening of 20 or 21 June. The Minister did not contact the Chairperson before travelling out of Nigeria on 20 June.

A Reprisal for Critical Work

The actions of the Minister in attempting to remove the Executive Secretary of the National Human Rights Commission created uproar both within and outside Nigeria. All the reactions were unanimous that the action of the Minister was an unlawful interference with the independence of the National Human Rights Commission.

In a joint statement issued 28 June, the Special Representative of the Secretary-General of the United Nations on Human Rights Defenders, Hina Jilani, and the Special Rapporteur of the African Commission for People and Human Rights on Human Rights Defenders, Reine Alapini-Gansou, expressed "profound concern" at the purported removal of Mr. Bello. They feared that "Mr. Bello's removal was occasioned because of his public statement of the critical stance taken by the National Human Rights Commission on a number of human rights issues" and confirmed that "Mr. Bello has been targeted by the Government following his statement at the thirty-ninth session of the African Commission on Human and Peoples Rights, press statements and media appearances criticizing the failure of authorities to respect human rights and the rule of law."

In particular, the Special Representative and the Special Rapporteur concluded that:

> The Special Representative and the Special Rapporteur find that the removal of Mr. Bello represents a reprisal for his critical work in the defence of human rights as Executive Secretary of the National Human Rights Commission. The experts regret this form of interference with the work of the National Human Rights Commission that can only result in undermining its independence and obstructing its work for the protection and promotion of human rights. They, therefore, urge the Government of Nigeria to take all measures that are

necessary to restore confidence of the Commission in the guarantee of its independence and freedom to perform its essential functions.[6]

The Nigerian Human Rights Community unanimously denounced the purported removal of Mr. Bello, describing it as an unwarranted interference in the independence of and an attempt to intimidate the Commission.[7] In two separate petitions to the African Commission on Human and Peoples Rights and the United Nations High Commissioner for Human Rights, they urged the suspension of consultative relations between the Nigerian National Human Rights Commission and regional and international institutions for the protection of human rights.[8]

Leading international human rights organisations, including International Federation of Human Rights, International Service for Human Rights, Amnesty International, Human Rights Watch, and the World Organisation against Torture (OMCT), all strongly denounced the actions of the Justice Minister. In a Joint Statement on 23 June, the Observatory for the Protection of Human Rights Defenders, a joint programme of the International Federation of Human Rights and the Geneva-based World Organisation against Torture, condemned decision to remove Mr. Bello as "an attempt to silence the Commission and to prevent it from carrying out its human rights mandate" The International Service for Human Rights denounced the Minister's action saying it "violates the United Nations principles regulating the status and functioning of National Human Rights Institutions, which are spelled out in the Paris Principles."[9] Human Rights Watch described it as a "politically motivated assault on the independence of the National Human Rights Commission"[10], while Amnesty International strongly condemned Mr. Bello's removal as "serious interference with the independence of the NHRC"[11]

Justice Minister's Belated Explanation

The Minister initially publicly offered no reasons for his actions. Following consultation with his Council members and in the absence of contact or feedback from the Minister, Justice Iguh, as Chairperson of the Council of the National Human Rights Commission, scheduled an emergency meeting of the Council of the Commission on Tuesday, 27 June. Shortly before the beginning of the meeting on the same day, the officials from the office of the Minister delivered a letter to the Chairperson of the Council, inviting them to a meeting with the Justice Minister in his office at noon on Friday, 30 June 2006. By the time of his meeting with the Council of the National Human Rights Commission, the Justice Minister was faced with a crisis of his own making.

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[6] United Nations Office at Geneva, " UN and African Commission Experts on Human Rights Defenders Concerned over Removal of Head of Nigerian Human Rights Body", available at , visited 5 July 2006. http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/86EEDABDF571503EC12 5719B005BD816?OpenDocument, visited 5 July 2006.

[7] Nigerian Human Rights Community, "Independence of National Human Rights Commission Must be Defended: NGOs Call for Sanctions if Nigeria Sacks Executive Secretary", Press Statement, 22 June 2006.

[8] Ise-Oluwa Ige, Innocent Anaba & Abdulwahab Abdullah, "Nigeria: Civil Society/NGOs Petition African Rights Commission" Vanguard, 30 June 2006, available at, http://allafrica.com/stories/200607010061.html visited 5 July 2006.

[9] International Service for Human Rights, Press Release, 23 June 2006.

[10] Human Rights Watch, Press Release, 29 June 2006.

[11] Amnesty International, Public Statement, Nigeria: Government Interference with the Independence of the National Human Rights Commission ", AI INDEX: AFR 44/012/2006.

Before the meeting began on 30 June, the Minister ordered Mr. Bello who had accompanied members of the Council of the Commission, out of his office building. At the meeting, which took place two weeks after the Minister's first encounter with Mr. Bello, the Justice Minister for the first time informed the members of the Council of the Commission that he "re-deployed" the Executive Secretary to pave way for an administrative and financial audit and investigation of complaints of financial and administrative irregularities lodged with him by several persons against Mr. Bello.[12] When asked by surprised members of the Council whether he had brought the existence or contents of these allegations to the attention of Mr. Bello, the Minister reportedly admitted that he had not. He also was unable to offer any reasons for the delay in notifying the Council of the Commission of the existence of allegations.

In explaining his actions, the Minister, in a statement published by Thisday Newspaper on Tuesday, 4 July 2006, claimed:

> *As the parent Ministry, we thought we should allow investigation to take place, and because he is still a serving staff of the Ministry of Justice, that's why he has been redeployed to the Ministry. A panel is being set up to carry out the investigations. I met with members of the Human Rights Commission (June 30) because I thought I should intimate them of this before telling the world. If he's cleared of the allegations, he goes back to the job. They are just allegations. He has not been removed, he's just been redeployed. It has nothing to do with all the insinuations that he was redeployed because of his comments in The Gambia on AIT, sit tight African leaders, Gauntanamo Bay or others.*
>
> *I, as supervising Minister, am entitled to redeploy a serving staff of the Ministry of Justice anytime I deem fit. It's also based on part of the reforms and brings to the fore, the reforms we want to make in the Human Rights Commission, in line with the ongoing reforms in the Justice Sector. I'm of the view that a serving staff of the Ministry of Justice should not be in charge of the Human Rights Commission, preferably it should be someone from outside, to give it a true independence the place really deserves. It will continue to be the way it is until the reforms are concluded and the law is amended accordingly. There's an amendment Bill on the Human Rights Commission before the House of Assembly right now, as part of the reforms, which I envisage. People should hear the other side before they jump to conclusions and start making insinuations. All we're trying to do is to reposition or reorganise the Human Rights Commission.*[13]

Until the time of this report, the Minister had failed to substantiate his allegations against Mr. Bello. He had not communicated the existence of any such allegations or their contents to Mr. Bello or to his legal representatives. Similarly, the Minister had also failed to announce the membership of the panel to inquire into the allegations nor provide details of their place of sitting or methods of work.

Playing Low and Dirty: Ministerial Abuse of Power

24 hours before the meeting with the Council of the Commission, the office of the Justice Minister began to float the name of Mrs. Folashade Ajoni, a staff of the Federal Ministry of Justice

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[12] Tony Amokoedo, "FG Raises Panel to Probe Ex-Rights Commission Boss", *The Punch*, July 3 2006, 9

[13] Funke Aboyade, "As Supervising Minister I Can Re-deploy Serving Staff Bayo Ojo" , *ThisdayLaw*, Tuesday, 4 July 2006, available at http://www.thisdayonlinecom/nview.php?id=52131, visited on 2 July 2006.

representing the Minister on the Council of the NCHR, as replacement for Mr. Bello. In the week-end following the meeting, between 1 and 2 July, the Press Secretary to the Minister, Mrs. Boade Akinola, visited leading media houses in Lagos to plead with editors and heads of news rooms to "go easy" on the Justice Minister and focus instead on the Minister's belated and unsubstantiated allegations of financial irregularity against Mr. Bello.

On Monday, 3 July, the Minister announced the appointment of Mrs. Ajoni as Acting Executive Secretary of the Commission. This announcement contradicts the Minister's claim that he had no desire for staff of his Ministry to head the Commission.[14]

On Tuesday, 4 July 2006, the Justice Minister wrote to the Inspector-General of Police to request the deployment of Police personnel to prevent Mr. Bello from gaining access to the premises of the Commission. On the same day, about fourteen Police officers, including ten uniformed and four others in plain clothes were spotted around the premises. They claimed to have instructions from the Justice Minister to arrest Mr. Bello on sight if he showed up on the premises of the Commission. He made no allegation that Mr. Bello had committed or was suspected of a crime. This further substantiates the impression that the Minister chose to bend the law and abuse the institution of government in order to get his way.

On the following day, 5 July, Mrs Ajoni resumed duties at the headquarters of the Commission in Abuja. In a statement issued on the same day, the Nigerian Human Rights Community described her appointment by the Minister to the position of Acting Executive Sectary of the Commission as "unlawful, illegal, and unknown to law", declaring that they "will not accord any recognition to the office of the Acting Executive Secretary and will campaign to ensure that regional and international institutions for the protection of human rights similarly deny the office recognition."[15]

The Minister Acted Unlawfully

Nigeria's National Human Rights Commission is established under the National Human Rights Commission Act, No 25 of 1995 to protect human rights, investigate allegations of violations of human rights by both government and other actors, assist victims of human rights violations and undertake activities to promote human rights policy, education, and awareness such as seminars, conferences, studies etc.[16] The work of the Commission is overseen by a Council which comprises a Chairperson, representatives of the Federal Ministries of Justice, Foreign Affairs, and Internal Affairs, representatives of human rights NGOs, the Nigerian Bar, and the media; three other persons representing a diversity of interests, and the Executive Secretary.[17]

Under S.2(2)(g) of the Act, the Executive Secretary is a member of the Council of the Commission. According to S. 4(2):

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[14] "Rights Commission Gets Interim Head", *The Punch*, 5 July 2006, 8

[15] Nigerian Human Rights Community, "Appointment of Acting Executive Secretary of National Human Rights Commission is Unlawful" Press Statement, 6 July 2006.

[16] National Human Rights Commission Act, Section 5.

[17] *Ibid.*, Section 2(2)

A member of the Council may be removed from office by the President, Commander-in-Chief of the Armed Forces if he is satisfied that it is not in the interest of the Public that the member should remain in office.

Concerning the tenure of the Executive Secretary, the same law provides in Section 7(2):

The Executive Secretary shall hold office for a term of five years in the first instance on such terms and conditions as the President, Commander-in-Chief of the Armed Forces may, on the recommendation of the Attorney-General of the Federation, determine, and may be re-appointed for one further term of five years and no more.

Clearly, under the National Human Rights Commission Act, the Justice Minister lacks the power to remove the Executive Secretary of the National Human Rights Commission or appoint a replacement. These are powers that only the President can exercise. Moreover, as a Presidential appointee, Mr. Bello was not and could not be available for re-deployment unless he had been lawfully removed from his statutory office. This has not yet happened. Contrary to the claim by the Minister of Justice, the office of the Executive Secretary of the National Human Rights Commission is a statutory creation, not an appendage of the Ministry of Justice. This is the legal basis for insisting that its independence deserves to be defended.

Violations of African Charter and Paris Principles

Quite apart from being unlawful, the action of the Minister also violated international legal standards obliging Nigeria to protect, respect and uphold the independence of the Commission. In Article 26 of the African Charter on Human and Peoples' Rights, which is domestic law in Nigeria, the government of Nigeria undertakes to "guarantee the independence of. ...appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed in the Charter."[18] Principle 3(a)(iv) of the Paris Principles,[19] requires the establishment of National Human Rights Commissions for the purpose of "drawing the attention of the government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the government." Principle 6 of the Paris Principles requires governments to "ensure a stable mandate for the members of the national institution, without which there can be no real independence."

Serious Diplomatic Consequences for Nigeria

By orchestrating these serious violations of Nigeria's domestic, regional, and international obligations, the Justice Minister and Federal Attorney-General, Bayo Ojo, SAN, exposes the country to serious diplomatic consequences and loss of international esteem, including:

- Domestically, the NCHR will lose the support and participation of Nigeria's respected and quite active human rights community and of donors. Already, in response to the actions of the

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[18] Schedule to African Charter on Human and Peoples' Rights (Ratification and Enforcement Act), Cap 10Laws of the Federation of Nigeria 1990, Article 26.

[19] Principles Relating to the Status of National Institutions (Paris Principles), Adopted by General Assembly resolution 48/134 of 20 December 1993.

In acting the way he has, the Attorney-General usurped Presidential powers. He has also done incalculable damage to the largely successful efforts of the administration of President Olusegun Obasanjo to reconstruct Nigeria's international esteem and reputation. Above all, the Federal Attorney-General has lowered the esteem and authority of his office. He has become a liability to the federal government and, in the circumstance, his position has clearly become untenable.

While considerable, the damage caused by the Justice Minister's misconduct is not irreparable. For this purpose, the Nigerian Human Rights Community recommends:

- An urgent and independent public inquiry into the serious allegations of abuse of power against the Minister of Justice and Federal Attorney-General.

- Pending this inquiry, Mr. Bayo Ojo, SAN, should stand down as Attorney-General or, if he fails to do so, be relieved of his position, in the public interest.

- The Federal Government should guarantee that it will respect and uphold the independence of the NCHR. To implement this guarantee, a joint working party of representatives of the government, the NCHR, and the Nigerian Human Rights Community, in partnership with the United Nations High Commissioner for Human Rights, the African Commission on Human and Peoples' Rights, and the Co-ordinating Committee of African National Human Rights Institutions, should establish firm benchmarks for monitoring compliance with this guarantee.

- Until the Federal government credibly guarantees the independence of the NCHR, Nigerian and international human rights organisations should not accord any recognition to the office of the Acting Executive Secretary of the Commission.

- The Co-ordinating Committee of African National Human Rights Institutions should suspend the membership of the NCHR until Nigeria brings the Commission into compliance with the Paris Principles.

- Similarly, regional and international human rights institutions, including the United Nations High Commissioner for Human Rights and the African Commission on Human and Peoples' Rights should suspend collaboration with the Commission except technical assistance designed to ensure full restoration of its independence; and

- The Federal government should respect and recognize Mr. Bukhari Bello as of the Executive Secretary of the NCHR and refrain from interfering with the discharge of his responsibilities in that position

Minister, the Nigerian human rights community has announced suspension of collaboration with both the Federal Ministry of Justice and the NCHR.[20] Also, in protest, at least one international partner of the Ministry and Commission has suspended 22 indefinitely further collaboration with the Commission.[21]

- At the regional level, the African Commission on Human and Peoples' Rights will suspend the Affiliate Status of Nigeria's NCHR once it confirms these violations. This suspension will deny Nigeria vital representation at the highest levels of human rights policy making in Africa.

- For similar reasons, Nigeria will also lose its position as Chairperson of the Co-ordinating Committee of African National Human Rights Institutions and will be suspended from further membership of this important regional forum of African national human rights institutions pending full restoration of the independence of the Commission.

- Internationally, Nigeria will be suspended indefinitely from membership of the International Co-ordinating Committee of National Institutions (ICCNI), pending recertification of its compliance with the Paris Principles.

- In addition, Nigeria will lose it membership of the very influential sub-committee on Credentials and Accreditation of the ICCNI on which it represents Africa. Hosted by the United Nations High Commissioner for Human Rights, the Credentials and Accreditation Sub-Committee currently comprises four countries selected on a representative basis, namely: Canada (Americas), Denmark (Europe), Fiji (Asia-Pacific), and Nigeria. This Committee is responsible for monitoring and certifying compliance with the Paris Principles by newly established national human rights institutions. Such certification is a pre-condition for membership of the ICCNI. Together, these measures risk returning the country to the international pariah status of its recent past.

Conclusions and Recommendations

The Justice Minister's removal of the Executive Secretary of the NCHR was a clear case of abuse of power. There is overwhelming evidence to show that it was a premeditated act of reprisal against Mr. Bello for his bold efforts to hold Nigeria's federal government accountable for its poor human rights record.

The Justice Minister lacked legal authority to remove Mr. Bello or to appoint a replacement in his stead. Such authority resides only with the President of the Republic. In the absence of such authority, the Attorney-General resorted to smears, threats, and intimidation of a public servant. The Minister clearly interfered with the independence of the NCHR in the most egregious way possible. In so doing, he damaged the credibility and effectiveness of the Commission.

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[20] Abdul Wahab Abdullah, "Rights Groups Withdraw Collaboration with FG", *Vanguard*, Tuesday, 27 June 2006, page 4

[21] Josephine Lohor, "Global Human Rights Bodies Move Against Nigeria", *Thisday*, 23 June 2006, available at

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